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In The

Supreme Court of the United States

October Term, 1980

No.

DONALD R. DREISKE,

Petitioner,

vs.

THERMASOL, LTD.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

1. Must a legal proceeding be started in full compliance with statute?

2. Is the ignoring of service of notice to begin a proceeding (in manner provided by state statute) a denial of due process?

3. May a state statute, as to proper service of notice beginning an arbitration proceeding, be applied only in part and still constitute due process?

4. May a party be held to the judgment confirming an arbitration award, when that party held never received the statutory notice of the Demand for Arbitration?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

DONALD R. DREISKE,

Petitioner,

-against-

THERMASOL, LTD.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF NEW YORK

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the Court of Appeals of the State of New York entered in these proceedings on

February 26, 1981.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York has not yet been reported, but is set forth in the Appendix infra at page 1a.

The decision of the Supreme Court, Appellate Division, First Department, which opinion was affirmed without opinion expressed by the Court of Appeals, has not been found as a reported case to this date, but is set forth in the Appendix, infra, at page 2a.

The Supreme Court, Appellate Division, First Department, reversed two opinions (each concurring with the other) of the court of first instance.

The court of first instance, the

Supreme Court of the State of New York, New York County, had twice agreed with Petitioner stating that proper, legal service is necessary to validate any proceeding sought to be instituted by such service.

JURISDICTION

Judgment was entered on February 26, 1981, in New York's highest court, the Court of Appeals. Petitioner alleges 28 U.S.C. §1257 permits the issuance of a writ of certiorari as petitioner was denied his right of due process as provided in Amendment V:

> No person . . . shall be deprived of life, liberty, or property, without due process of law

and as provided in Amendment XIV:

> . . . nor shall any State deprive any person of life, liberty, or

property without due process of law.

Petitioner's right to due process here meant that the statute as to service of process must be followed before the New York article on arbitration could become an issue. That is, the commencement of a binding arbitration should have followed the mandatory statutory language in the giving of notice ("Demand for Arbitration") that an arbitration hearing was to be had; and failing this, an arbitration award resulting from an inquest-type proceeding could not be, should not be, confirmed as a judgment of court. Yet, it was confirmed; and notice following the statute was not had.

STATEMENT OF THE CASE

Petitioner (here), the individual Donald R. Dreiske, assumed a contract with the respondent (here), the corporation Thermasol, Ltd. "Thermasol" sought to give "Dreiske" notice (called both a Demand for Arbitration and a Notice of Intention to Arbitrate). Using a statutory provision as to commencement of service, Thermasol used certified mail, return receipt requested. The notice was sent to a wrong address for Dreiske, but was forwarded to his correct address with postage due. Dreiske's agent (his clerk) routinely refused payment and the certified mail envelope was returned to Thermasol.

Thermasol nevertheless held an arbitration proceeding without Dreiske being present, akin to an inquest in court, and

secured an award. Thermasol then went to the New York court of first instance to confirm the award as a court judgment (as provided by statute).

The court of first instance refused to confirm. Instead it vacated the arbitration award, finding

> While it is true that CPLR 7511(b)(2) does not specify defective service as a ground for vacating an award . . . the Court has inherent power to set aside any determination on default on proof that adequate notice had not been given.

In the second opinion of the court of first instance (by another Justice and rendered upon Thermasol's motion to reargue - renew) the first opinion was upheld.

Upon Thermasol's appeal, the appellate court reversed, denying its inherent

power in effect and alleged subsequent notices had been sent (although to the same wrong address) and so Dreiske had received adequate notice.

New York's highest court, the Court of Appeals, then, without a hearing, stated in full:

> On summary consideration, order affirmed, without costs. There is no basis in the record for vacatur of the award under CPLR 7511. All concur.

Dreiske, this Court's petitioner, alleges there is, there must be if there is due process, a condition precedent prior to using New York's arbitration statute (CPLR §7501 et seq.). That condition precedent is the right to proper, statutory notice. That means a notice sent to the correct address of the person to be held (Dreiske) with the postage

fully prepaid. Even if -- and Dreiske states this as though a demurrer -- there were subsequent arbitration procedural notices, sent to the wrong address for Dreiske which (for any reason) were not returned, this proves nothing. At best Dreiske avers this only shows that forwarding and proper postage was paid.

The important element is the first notice, a properly served Demand for Arbitration. Without this, the claim of jurisdiction over Dreiske should fail. For without legal notice, due process has become a meaningless phrase.

REASONS FOR GRANTING THE WRIT

Either a statute providing for a certain way or method of service is to be followed, or the rule of law is worthless.

If a statute provides, as does New York's, for commencement of a proceeding to be made by several methods, and the one chosen is improperly used, the onus of impropriety should be on the user. Without that, a detriment to the other can follow (as did to Dreiske). The statutory requirements were for correct address and full prepayment of postage; neither requirement was met. Yet the appellate court in New York said, in effect, as that was not a stated ground for vacating an arbitration award, it was just too bad for Dreiske.

A further note is that the arbitration association concerned, the American Arbitration Association, provides in its rules for the "last known address" to be used, so there is a double-barreled ob-

jection here by your petitioner Dreiske. The statute was not followed. The "AAA" Rule was ignored. There was no due process accorded.

The issue is simply: is proper, legal service required to institute a proceeding; here an arbitration proceeding? If not required, the floodgates of malfeasance swing open.

ARGUMENT

New York State is "pro" arbitration. No quarrel on that. New York has its procedure embodied in the Civil Practice Law and Rules ("CPLR") and §7501 et seq. (Article 75) thereof deals with arbitration. The American Arbitration Association is "the" association for commercial arbitration dispute handling, and was

used here. It has its Rules.

The CPLR Arbitration Article speaks of vacating an arbitration award, §7511(b), if the rights of the party were prejudiced by misconduct in procuring the award, or if the arbitrator exceeded his power. It does not speak of proper, legal commencement. Dreiske avers he was prejudiced in that the Demand for Arbitration was never served upon him.

CPLR §7503(c) in the Arbitration Article states a Demand is to be served "in the same manner as summons or by registered or certified mail, return receipt requested." CPLR R2103(b)(2) and (c) require for all mail service that the entire postage must be prepaid (" . . . enclosed in a postpaid properly addressed wrapper.") Also, 8 Weinstein-Korn-Miller,

N. Y. Civil Practice - CPLR ¶7503.29; Siegel, New York Practice (1975) states at page 239: "The paper must be enclosed in a properly stamped envelope . . . " The American Arbitration Association by its Rule 39(b) requires "any papers, notices . . . for the initiation . . . of an arbitration . . . served . . . at his last known address . . . " This was never done, but rather Thermasol used an address of the business that Dreiske had purchased and was neither his office address nor his home address, as clearly given in the pertinent contract assumed, that contract providing for dispute settlement by arbitration.

Arguing as though a demurrer, even if arbitration procedural notices were later sent by "AAA," forwarded, and even

assume received (though this was not shown), such properly are irrelevant. The first notice, akin to a summons for it begins the action or proceeding, must be properly served or no jurisdiction of the party attempted to be served is had -- barring of course a waiver, which is not the situation here.

Proper notice is a requisite to Due Process. Anderson National Bank v. Luckett (1944) 321 U.S. 233, 246; United States v. Steel Tank Barge H 1651 (DC ED La. 1967) 272 F.Supp. 658, 659. One of two quotations follows:

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." * * * It is equally fundamental that the right to notice and an opportunity

> to be heard "must be granted at a meaningful time and in a meaningful manner."
>
> (Fuentes v. Shevin (1970) 407 U.S. 67, 80)

Failure to give Dreiske proper notice by not sending the Demand for Arbitration to his correct address and by not prepaying the postage, denied such requirements. Actually, even New York once agreed:

> [385] . . . it becomes incumbent upon the court to determine whether due notice of the arbitra- [386] tion was given to the [other side]. If it was not, then the arbitration likewise falls and it follows that the award should be vacated . . .
>
> (In Matter of Kyne (Molfetas) [1st Dept. 1957] 3 N.Y. A.D. 2d 384, 385-6, 160 N.Y.S.2d 605)

There is nothing more and nothing less. Either procedural due process requires adherence to statutory (and rule) notice requirements, or, a selective

selection of law is made and then the rule of law is indeed a mockery.

The adherence to law is what is called "due process of law" in our Constitution, Amendments V and XIV; what is "due process of law" is that discussed above, namely, that a party against whom an action (proceeding) is begun shall have proper, legal, notice, complete to the dotting of the "i" and the crossing of the "t."

CONCLUSION

The issue is the degree of adherence to procedural requirements for beginning a proceeding. Dreiske, your petitioner here, avers all requirements (prepaid postage and correct address) must be followed before a valid proceeding can follow. Thermasol differs and upon appeal

it was upheld.

Petitioner Dreiske prays his writ of certiorari be granted to settle this issue, an issue going to fundamental rule by and of law.

May 6, 1981

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Attorney for Petitioner

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[212] 730-1755

APPENDIX

DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

[Dated February 26, 1981]

No. 254

In the Matter of Thermasol, Ltd.,
Respondent,
v.

Donald R. Dreiske,
Appellant.

On summary consideration, order affirmed, without costs. There is no basis in the record for vacatur of the award under CPLR 7511.

All concur.

DECISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 25, 1980

Present--Hon. Francis T. Murphy, Jr., Presiding Justice
Arnold L. Fein
David Ross
Max Bloom, Justices.

Thermasol, Ltd.,

Petitioner-Appellant,

-against-

Donald R. Dreiske,

Respondent-Respondent.

[Appeal No. 9323-24]

An appeal having been taken to this Court by the petitioner-appellant from a

judgment of the Supreme Court, New York County (B.Cohen, J.), entered on April 24, 1980, which upon granting petitioner's motion for a renewal of the denial of petitioner's application to confirm an arbitration award and the granting of respondent's application to vacate the award, adhered to the original determination, in so far as appealed from, and said appeal having been argued by Mr. Preston S. Scher of counsel for the appellant, and by Mr. Cameron K. Wehringer of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the judgment so appealed from be and the same is hereby reversed on the law, and the petition to confirm the arbitration award

is granted and the cross application to vacate the award is denied. Respondent-respondent shall recover of petitioner-appellant $75 costs and disbursements of this appeal. The appeal from the judgment of said court (Carro, J.), entered on January 3, 1980, is dismissed as academic since that judgment was superseded by the judgment made on renewal.

ENTER:

JOSEPH J. LUCCHI

Clerk.

Murphy, P.J., Fein, Ross, Bloom, JJ.

9323-24

Thermasol, Ltd.,
Petitioner-Appellant, P.S.Scher

-against-

Donald R. Dreiske,
Respondent-Respondent. C.K.Wehringer

Judgment, Supreme Court, New York County,(B.Cohen,J.) entered April 24, 1980, which upon granting petitioner's motion for a renewal of the denial of petitioner's application to confirm an arbitration award and the granting of respondent's application to vacate the award, adhered to the original determination, in so far as appealed from, reversed on the law, and the petition to confirm the arbitration award is granted and the cross application to vacate the award is denied, with costs

and disbursements to petitioner.

Appeal from the judgment, (Carro,J.) entered January 3, 1980, is dismissed as academic since that judgment was superseded by the judgment made on renewal.

In 1975, petitioner-appellant leased certain equipment to Clinton Inns,Inc., under an agreement containing a broad arbitration provision. This equipment was installed in a Holiday Inn located in Clinton, Oklahoma. Thereafter, this motel was sold to respondent and his partner, Bailey, who, jointly and severally, assumed all obligations under the lease with petitioner. The new lessees failed to pay the required rental fees and petitioner demanded arbitration pursuant to the terms of the lease.

Clinton Inns,Inc. was served with this

demand by certified mail, return receipt requested. Service upon respondent and Bailey was attempted in a similar fashion. Identical postage was affixed to all three envelopes. The demand to Clinton Inns was delivered and accepted but the demands sent to respondent and Bailey at the Holiday Inn were returned unopened. After delivery of these demands was refused at the Holiday Inn, they were then forwarded to an address in Oklahoma City, with a notation of twenty-five cents postage due. Thereafter, the American Arbitration Association sent three additional notices of the arbitration proceeding to respondent and Bailey by ordinary mail. These latter notices were never returned. All three parties failed to appear at these proceedings and an award was rendered based on

the uncontested proof submitted by petitioner.

Petitioner moved to confirm the award against Bailey and Clinton Inns, Inc., and they cross moved to vacate. Special Term, however, confirmed the award finding that the contentions of non-receipt of the demand was unsupported by any personal affidavit and did not overcome the post office certification that the notice was "refused". This judgment was affirmed by this Court (73 AD 2d 847, lv to appeal den. 49 NY 2d 702).

During the pendency of the above appeal, petitioner moved to confirm the award against respondent. Respondent opposed, asserting, inter alia, that he never received the demand. Special Term

vacated this award on the ground that adequate notice of the pending arbitration proceeding had not been given to the respondent. We disagree. We are convinced that respondent received sufficient notice of the arbitration proceedings and is merely utilizing this dilatory tactic in an attempt to stave off payment of his just debts.

Prior to vacating any award the Court must make a threshold determination that the rights of the party seeking to vacate the award were prejudiced [CPLR §7511(b)(1)]. The facts before us sufficiently demonstrate that such a conclusion could not have been reached. The parties agreed to arbitrate any dispute in accordance with the rules of the American Arbitration Association. The rules of the Association

provide in pertinent part that notice of the demand for arbitration may be served by ordinary mail. Respondent received full and adequate notice of the pending arbitration proceedings in three letters sent to him over a four-month period by the American Arbitration Association. Respondent's rights were not impaired by this manner of service. Since there was no demonstrated prejudice to respondent, Special Term erred in vacating the award.

All concur.

Order filed.

DECISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY, AT SPECIAL TERM, PART I, DATED DECEMBER 31, 1979

Supreme Court of the State of New York, New York County, Special Term, Part I, at the Courthouse thereof, 60 Centre Street, New York, New York, 10007.

Present: HON. JOHN CARRO,
Justice.

Thermasol Ltd.	
-against-	[STAMP]
Donald R. Dreiske	

The following papers numbered 1 to 15 read on this motion, submitted

	Papers Numbered
No. 18 on Calendar of 10/11/79	
Notice of Motion-Award and exhibits and Affidavits Annexed	1-6
X-motion-Answering Affidavits	7-10
Replying Affidavit in opposition to X-motion	11-13
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Reply Affidavit	15

* * * * * *

Upon the foregoing papers this motion is decided in accordance with accompanying memorandum decision.

Dated 12/31/79 J. Carro
J.S.C.

Briefs: *** Petitioner's x
Respondent's x

* * * * * *

County Clerk's No. 4900, 1979
Spec. I Liber T123 Line 5, 1979

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NEW YORK CO.
CLERK'S OFFICE

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I
----------x

THERMASOL, LTD.,

[STAMP]

Petitioner,

INDEX NO.
4900/79

against

DONALD R. DREISKE,

Respondent.

----------x

CARRO, J.:

Petitioner seeks to confirm an arbitration award as against respondent, the award having been previously confirmed as against two other parties. Respondent cross moves to vacate the award. The critical facts are undisputed. Petitioner served a demand for arbitration by mailing same, certified mail, return receipt requested, to respondent in Clinton, Oklahoma. The letter was forwarded to an

address in Oklahoma City and was delivered there with a notation that 25¢ postage was due. Apparently because postage was due, the communication was refused and was returned to petitioner's attorney with notations indicating such refusal and that postage was due. The arbitration proceeded without respondent's presence, and an award was rendered in favor of petitioner.

CPLR 7503(c) directs that demands for arbitration be served in the same manner as a summons or by registered or certified mail, return receipt requested. The statute supersedes any rules of the American Arbitration Association permitting service by any other method. In the usual case, the return receipt establishes receipt of the demand by respondent or by someone authorized by respondent to receive his mail.

In the instant case, the return of the envelope, unopened, to the sender established that respondent did not receive the demand. While it can be logically argued that a potential respondent cannot frustrate the commencement of arbitration by refusing without reason to accept a piece of registered or certified mail, the face of the envelope returned to petitioner's attorney indicated a perfectly proper reason for such refusal. In this situation, apparently one of the first impressions, the Court finds that the arbitration was not properly commenced, since the very mechanics normally used to establish receipt of notice by respondent established in this case the exact opposite.

Since the arbitration was not commenced, it does not matter that respondent

may have received as many as three notices via ordinary mail from the arbitrator. Knowing of a possible defect in service, petitioner elected to proceed with the arbitration. Respondent did not appear and hence did not waive the defect.

While it is true that CPLR 7511(b)(2) does not specify defective service as a ground for vacating an award and that many cases have held that an award cannot be vacated except on one to bases therein stated, the Court has inherent power to set aside any determination on default on proof that adequate notice had not been given. In Kyne v Molfetos, 3 AD2d 384 (1st Dept. 1957), it was held that if due notice was not given, arbitration fails and the award should be vacated.

Accordingly, the petition is dis-

missed and respondent's motion is granted, without prejudice, however, to petitioner commencing a new arbitration by properly serving demand therefor on respondent.

Dated: Dec. 31st, 1979

S/ G CARRO
J.S.C.

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DECISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY, AT SPECIAL TERM, PART I, DATED APRIL 17, 1980

[NEW YORK LAW JOURNAL - Friday, April 25, 1980]

COURT DECISIONS

FIRST JUDICIAL DEPARTMENT

New York County

SUPREME COURT
Special Term, Part I

Justice B. Cohen

THERMASOL LTD v. DREISKE--This motion, denominated a motion for leave to reargue, is actually a motion to renew. The motion is granted. On renewal, the Court adheres to Judge Carro's decision. See memorandum on file.

SUPREME COURT, NEW YORK COUNTY
SPECIAL TERM, PART I

THERMASOL, LTD.,

Petitioner,

-against-

DONALD R. DREISKE,

Respondent.

Index No.
#5 4900/79

2/19/80

B. COHEN, J.:

Petitioner moves to reargue the dismissal of its petition to confirm an arbitration award and the granting of respondent's motion to vacate said award. The decision sought to be reargued was made by Mr. Justice Carro, since appointed to the Appellate Division.

The facts of the case are that a demand for arbitration was sent to respondent Donald A. Dreiske by certified mail with

insufficient postage and upon being presented at the motel which was respondent's forwarding address, by the post office, it was refused.

Respondent Dreiske, in opposition to the Carro motion to confirm and in support of his cross-motion to vacate, submitted (1) his affidavit to the effect that he did not receive the demand for arbitration and (2) an affidavit from the desk clerk of the motel stating that the motel refuses all postage due mail. Judge Carro ruled that the arbitration based on the undelivered demand was not properly commenced and vacated the award.

The ground for petitioner's motion for leave to reargue is that the same award against other respondents in favor of petitioner involving the same service

on the other respondents was upheld by Judge Williams who confirmed the award and that that determination was upheld by the Appellate Division after Judge Carro's decision had been rendered.

It appears from a study of the papers submitted on this motion that on the motion decided by Judge Williams there were no affidavits by respondent in opposition denying receipt of the demand to arbitrate nor by the desk clerk detailing the refusal of acceptance of postage due mail. It appears further, that these affidavits were submitted on a motion for leave to reargue. However, the motion for leave to reargue was denied by Judge Williams. Accordingly, the opposing affidavits were not before Judge Williams on the original motion to confirm the arbitra-

tion award and therefore were not part of the record on appeal from that decision. The affirmance by the Appellate Division is not binding on this court with respect to the motion at bar. In this motion, decided by Judge Carro, the facts before the court are different from the facts before Judge Williams.

This motion, denominated a motion for leave to reargue, is actually a motion to renew. The motion is granted. On renewal, the Court adheres to Judge Carro's decision.

Dated: April 17, 1980

/S BSC
J. S. C.

F I L E D
APR 24 1980
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CLERK'S OFFICE

CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment XIV

1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. . . . .

NEW YORK CPLR

R 2103. Service of Papers

. . .

(b) . . . Except where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon his attorney. Where the same attorney appears for two or more parties, only one copy need be served upon him. Such service upon an attorney shall be made.

. . .

2. by mailing the paper to him at the address designated by him for that purpose or, if none is designated, at his last known address; service by mail shall be complete upon deposit of the paper enclosed in a postpaid properly addressed wrapper, in a post office or

official depository under the exclusive care and custody of the United States post office department within the state;

. . .

(c) . . . If a party has not appeared by an attorney . . . service shall be upon the party himself by a method specified in paragraph one, two or four of subdivision (b).

NEW YORK CPLR

§7503. Application to compel or stay arbitration; stay of action; notice of intention to arbitrate

. . .

(c) Notice of intention to arbitrate. A party may serve upon another party a demand for arbitration or a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice, or of an officer or agent thereof if such party is an association or corporation, and stating that unless the party served applies to stay the arbitration within twenty days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has

not been complied with and from asserting in court the bar of a limitation of time. Such notice of demand shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. An application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be precluded. Notice of such application may be made upon the adverse party, or upon his attorney if the attorney's name appears on the demand for arbitration or the notice of intention to arbitrate. Service of the application by mail shall be timely if such application is posted within the prescribed period. Any provision in an arbitration agreement or arbitration rules which waives

the right to apply for a stay of arbitration is hereby declared null and void.

NEW YORK CPLR

§7511. Vacating or modifying award.

(b) Grounds for vacating.

1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds the rights of that party were prejudiced by:

(i) corruption, fraud or misconduct in procuring the award; or

(ii) partiality of an arbitrator appointed as a neutral; except where the award was by confession; or

(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or

(iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

. . . .

(e) Confirmation. Upon the granting of a motion to modify, the court shall confirm the award as modified; upon the denial of a motion to vacate or modify, it shall confirm the award.